

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 08-1980

APRIL E. COUCH, ADMINISTRATRIX OF THE ESTATE OF LURENE N. HALL
Plaintiff-Appellee

-vs-

AKRON GENERAL MEDICAL CENTER, et al.
Defendant -Appellants

ON APPEAL FROM THE NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 24066

MERIT BRIEF OF
PLAINTIFF-APPELLEE, APRIL E. COUCH, ADMINISTRATRIX

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STATEMENT OF CASE

Plaintiff-Appellee, April E. Couch, Administratrix, commenced this medical malpractice action in the Summit County Court of Common Pleas on February 10, 2006. She alleged that Lurene N. Hall, Deceased (“Decedent”), had died during the course of a routine catheter implant procedure which had been negligently mismanaged by Defendant-Appellant, Richard Patterson, Jr., M.D. Defendant was employed by Defendant-Appellant, Radiology & Imaging, Inc., at the time. Defendants submitted an Answer denying liability and interposing various affirmative defenses on August 22, 2006. Several other Defendants had also been named in the Complaint, all of which were voluntarily dismissed during the course of the proceedings.

The jury trial commenced on December 3, 2007. During their case-in-chief, Plaintiff’s experts established that Defendant must have violated the standard of care by lacerating the inside wall of the Decedent’s superior vena cava while surgically implanting a hemodialysis catheter in the left side of her neck. *Tr. Vol. II, pp. 267-270, 281-283; Vol. III, pp. 336-340.* Although he claimed that he had performed the procedure strictly “by the book,” Defendant had no explanation for how the fatal wound had occurred. *Id., Vol. I, p. 152.*

Because her experts had forcefully testified that veins are not supposed to be lacerated during catheter implant procedures by the medical devices in the surgeon’s exclusive control, Plaintiff requested a *res ipsa loquitur* charge from the court. *Tr. Vol. V, pp. 546-547.* The Judge proceeded to instruct the jury without advising them of this fundamental principle of Ohio tort law. *Id., pp. 624-647.* Plaintiff renewed her request for the *res ipsa loquitur* instruction, to no avail. *Id., p. 647.* The jury thereafter

returned a verdict in favor of Defendants. *Tr. Vol. V, pp. 649-651*. In an interrogatory which was signed by only six of them, they indicated that Defendants had been found not to be negligent. A judgment was entered accordingly on December 7, 2007.

Plaintiff commenced her appeal to the Ninth District and argued that the trial judge had impermissibly refused to (1) permit her to call the County Coroner on rebuttal, (2) furnish the *res ipsa loquitur* instruction, and (3) grant a new trial. The panel unanimously agreed with the second argument and vacated the defense verdict. *Estate of Hall v. Akron Gen. Med. Cntr.*, 9th Dist. No. 24066, 2008-Ohio-4332, 2008 W.L. 3918068. The Assignment of Error pertaining to the preclusion of rebuttal testimony was thus rendered moot and was never reached. *Id.*, ¶ 32.

On February 4, 2009, this Court granted jurisdiction to review the matter further.

STATEMENT OF THE FACTS

The following facts were established during the jury trial. The Decedent was a 54-year old resident of Akron, Ohio. *Tr. Vol. II, pp. 158-161.* She had worked as a nursing assistant in several local nursing homes. *Id., pp. 161-162.* The Decedent was an avid gardener and enjoyed spending time with her children and grandchildren. *Id., pp. 162-166.*

The Decedent had developed a number of health conditions, and was eventually required to start regular kidney dialysis treatments in June 2003. *Tr. Vol. II, pp. 169-170.* She first saw the Defendant on September 8, 2003 at Akron General Medical Center. *Id., Vol. I, p. 83.* He was an interventional radiologist employed by Defendant, Radiology & Imaging Services, Inc. *Id., p. 77.* A substantial portion of his practice had been devoted to performing surgical procedures with the assistance of imaging devices. *Id., pp. 80-82.*

During his initial encounter with the Decedent, Defendant was required to remove a dialysis catheter which had been surgically inserted in the right side of her neck. *Tr., Vol. I, pp. 83-84.* The catheter allowed the dialysis technicians to easily access her jugular vein for purposes of hemodialysis treatments. *Id.* As often occurs, the catheter had become infected with "staph aureus" and thus had to be removed. *Id., Vol. I, pp. 83-85 & 86-88; Vol. II, pp. 259 & 285; Vol. III, pp. 332 & 344-345.* Defendant performed the procedure without incident. *Id., Vol. I, p. 86.*

Two days later on September 10, 2003 the Decedent was scheduled for a new catheter to be surgically implanted in the left side of her neck. *Tr. Vol. I, p. 92.* She arrived in the procedure room at 2:30 p.m. and Defendant started the surgery ten

minutes later. *Id.*, p. 95. The plan was to implant a 32-cm catheter, which had been purchased by the hospital in a standard kit.¹ *Id.*, pp. 97-98. The package contained a guide wire which had a tip curled in a J-form. *Id.*, p. 98.

With the aid of an ultrasound image, the jugular vein was located. *Tr. Vol. I*, p. 106. Defendant accessed the vein using a "micropuncture introducer system." *Id.*, pp. 98-99. A 20-gauge needle was used to first enter the vessel and the guide wire was inserted down through the superior vena cava. *Id.*, pp. 107-108. Defendant was able to monitor the procedure with a fluoroscopy, which is essentially an x-ray which produces real-time images of what is happening inside the patient. *Id.*, pp. 103-105. The catheter kit contained three (3) "dilators" of increasingly larger size, which were used to widen the puncture hole which had been created with the needle. *Id.*, pp. 113-115. The standard of care required that the physician maintain the guide wire in the vein "at all costs." *Id.*, p. 116. The dilators had to be pushed into the skin while running through the wire in order for them to properly slide into the vein. *Id.*, pp. 117-118 & 123-125. With the fluoroscopy, the physician was able to visualize the dilator advancing over the guide wire and making the perforation. *Id.*, p. 125. Defendant testified that after he had created a sufficiently large opening in the Decedent's neck, the third dilator was removed and an Ash catheter was implanted. *Id.*, pp. 125-132. The "tunnel catheter" was tucked under the skin line and sutured in place. *Id.*, pp. 130-135.

Shortly after the procedure had concluded, the Decedent complained of pain in the insertion site to one of the nurses. *Tr. Vol. I*, p. 139. Defendant prescribed her Vicodin. *Id.* Fifteen minutes after she had taken the pain killer, the physician was

¹ Plaintiff's Exhibit 1 was a sample catheter kit. *Tr. Vol. I*, p. 97.

surprised to find her “still in the holding area.” *Id.*, p. 140. She was “lethargic” and “looked a little bit cool and a little bit clammy.” *Id.*, pp. 140-141. Defendant “thought she was having a neurologic event” and asked a nurse to have her “regular doctor paged and sent to her room.” *Id.*, pp. 143-144. Shortly after that, they lost her pulse and an emergency code was called. *Id.*, pp. 145-146.

The Decedent’s children had been expecting that they would be picking her up and returning her home following the routine medical procedure. *Tr. Vol. II*, pp. 175-176, 216-218 & 229-230. Instead, Plaintiff received a call from the hospital that her mother “had taken a turn for the worse” and she was needed immediately. *Id.*, p. 176. A nurse informed her when she arrived that the Decedent had passed away. *Id.*

Plaintiff’s interventional radiology expert was Michael Foley, M.D. (“Dr. Foley”). *Tr. Vol. II*, pp. 237-238. He confirmed that the County Coroner had found a laceration of the medial (inside) wall of the superior vena cava which was 4-cm in length.² *Id.*, pp. 260 & 266. The only conceivable explanation given the location of the cut and the timing of the Decedent’s quick demise was that Defendant had inadvertently pulled the guide wire back and the sharp tip of the third dilator had sliced into the vessel wall. *Id.*, pp. 290-295. The wound had allowed blood to leak into the pericardial sac which surrounds the heart. *Id.*, pp. 260-262. In an episode known as a “pericardial tapenade,” the pressure of the fluid filling in the sac crimped down on the heart and stopped it from beating. *Id.*, pp. 261 & 267-270. Had proper procedures been followed the fatality would not have occurred. *Id.*, pp. 298-300.

² A “pinpoint laceration of the left inferior pulmonic vein” was also found by the pathologist. *Tr. Vol. I*, p. 119; *Vol. II*, p. 266.

These opinions were supported by the compelling testimony of a Board Certified Vascular Surgeon, Jeffrey Kremen, M.D. ("Dr. Kremen"). *Tr. Vol. III, pp. 322-323*. He agreed that the only logical conclusion was that the dilator had "probably caused the rather large injury". *Id., pp. 327-328*. There would have been no complications if Defendant had followed accepted protocol during the procedure. *Id., pp. 335-336 & 340*.

The first defense expert, Matthew Leavitt, M.D. ("Dr. Leavitt"), attributed the laceration to either a "dilator" or "guide wire" which had been surgically inserted in the Decedent's left jugular vein during the procedure. *Tr. Vol. IV, p. 451*. The interventional nephrologist claimed merely that, if Defendant was being truthful about performing the procedure properly, then no violation of the standard of care occurred. *Id., pp. 431 & 458-459*. Except for one purely technical error, he could not quarrel with the autopsy report.³ *Id., Vol. IV, pp. 462-463*. Defendant's second expert, L. Mark Dean, M.D. ("Dr. Dean"), proceeded to assert that the coroner's reference to "bluish discoloration" in the autopsy report meant that there was an infection "eating away the lining of the blood vessel" which "unraveled" once the catheter was implanted. *Id., Vol. IV, pp. 495-498 & 512*.

Defendant had been able to review the coroner's autopsy report and knew that she had found the laceration. *Tr. Vol. I, p. 152*. The following poignant exchange took place during cross examination:

³ As Dr. Leavitt observed, and everyone agrees, the coroner had written that the laceration had occurred "during hemodialysis" instead of "during hemodialysis catheter insertion." *Tr. Vol. IV, p. 463*. Only the latter is correct. *Id.*

Q. *** [W]hen I took your deposition back in of June 2007, you had no explanation as to how that injury could have occurred; is that correct?

A. I still have no reasonable explanation.

Id., p. 152. Dr. Foley did have an explanation. In no uncertain terms, he testified that Defendant most likely pulled the guide wire back inadvertently which allowed the third dilator to be pushed through the vessel wall in violation of the standard of care. *Tr. Vol. II*, pp. 268-270, 281-283 & 289-290.

INTRODUCTION

Defendant-Appellants, Richard D. Patterson, Jr., M.D. and Radiology & Imaging Service, Inc., are seeking further review of a Ninth District decision which is both straightforward and unassailable. The unanimous panel simply held that a *res ipsa loquitur* instruction must be furnished upon request when conflicting expert testimony exists upon the question of whether the injury sustained ordinarily does not occur without negligence. *Hall*, 2008-Ohio-4332, ¶ 30. The ruling was firmly rooted in the precedent which had been established by this Court, most notably *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 406 N.E.2d 1385.

Contrary to Defendants' dire prognostications, the appellate court holding certainly has not "effectively guaranteed that jurors will be able to infer negligence in all medical malpractice cases." *Merit Brief of Appellants*, p. 6. The rule remains the same, as acknowledged by Defendants themselves earlier in the appeal, that "a plaintiff must adduce evidence in support of two conclusions (1) that the instrumentality causing the injury was under the exclusive management and control of the defendant; and (2) that the injury would not have occurred in the ordinary course of events absent negligence." *Court of Appeals Brief of Defendant-Appellees*, 9th Dist. Case No. 24066, p. 16. It should come as no surprise to anyone that, under such circumstances, the charge must be furnished when a timely request has been made in accordance with Civ.R. 51. And the jurors are certainly are not compelled to indulge in the *res ipsa* inference, as the charge only affords them that option. The defendant, of course, remains free to argue that the doctrine has no application under the facts of the case.

In an effort to create an intriguing legal question where none exists, Defendants' primary argument for reversal is founded upon the notion that the *res ipsa loquitur* instruction is never appropriate "when there exists 'direct' evidence of negligence." *Defendant-Appellants' Memorandum in Support of Jurisdiction*, p. 1. Not once was this peculiar theory raised in the proceedings below. The trial judge had denied the requested instruction with the following explanation:

My understanding of Ohio law is, is that if there are multiple potential causative factors, then the instruction is not given.

Tr. Vol. V, p. 548. During the post-trial proceedings, Defendants proceeded to champion this erroneous view of the law and maintained that:

Consequently, it is clear that the Court properly refused to instruct the jury on the doctrine of *res ipsa loquitur* because there was conflicting expert testimony regarding the cause of the laceration in the decedent's superior vena cava. Plaintiff's experts testified that the laceration could not occur absent negligence. Defendants' experts, on the other hand, testified that the perforation of major blood vessels is a known risk of any catheter placement procedure. *** [emphasis added]

Defendants' Brief in Opposition to Plaintiffs' Motion for New Trial, p. 12. Precisely the same arguments were advanced in the Brief which was submitted to the Ninth District. *Brief of Defendant-Appellees served June 9, 2008*, pp. 16-18. At no time did they depart from the nonsensical view that the instruction is only warranted when the experts are in full agreement as to its applicability. The appellate court was thus never afforded an opportunity to consider, and never commented upon, whether Plaintiff's case was predicated entirely upon "direct evidence" so that a *res ipsa loquitur* charge would be unwarranted as a matter of law.

As Defendants undoubtedly appreciated at the time, Plaintiff's medical

malpractice claim was hardly founded upon "direct evidence" of negligence. Dr. Patterson had candidly admitted that he had no explanation for the 4-cm laceration which had been discovered by the County Coroner during the autopsy. *Tr. Vol. I, p. 152.* None of the surgical assistants and nurses who were in a position to observe the routine out-patient procedure testified against Dr. Patterson. By necessity, Plaintiff's entire theory of liability was based purely upon circumstantial evidence.

Indeed, the absence of direct evidence of negligence was hardly lost upon defense counsel during closing argument. The following passage was typical of her remarks to the jury.

And, in fact, the evidence has shown that Dr. Patterson met the standard of care. There has been no evidence that he carelessly performed this procedure or that for some reason on this particular day he forgot how to perform the procedure, forgot what was important about the procedure. There is no evidence that he withdrew or allowed the guide wire to be withdrawn, which he clearly would have seen on these images as would [technician] Willie [Seith]. There is no evidence that he advanced the third dilator without the guide wire.

There is simply no evidence to support the plaintiff's claim.

Tr. Vol. V, pp. 603-604. As defense counsel openly acknowledged, Plaintiff's claim was indeed based entirely upon a circumstantial *res ipsa loquitur* theory.

Now, [Plaintiff's experts] told us that the only way that this injury, these injuries could occur is if Dr. Patterson did something wrong. ***

Id., p. 587. It had been conceded that Defendants had been in exclusive control of the dilator and guidewire which, Plaintiff's experts maintained, must have torn the superior vena cava. *Tr. Vol. I, p. 153.* This particular malpractice case was thus tailor made for the *res ipsa loquitur* instruction, which the trial judge inexplicably refused to furnish

because of his mistaken belief that the charge is unwarranted whenever the medical evidence is conflicting as to the existence of multiple causes.

ARGUMENT

The two Propositions of Law set forth in the Merit Brief of Appellants differ markedly from those which had originally appeared in the Memorandum in Support of Jurisdiction of October 10, 2008. Those earlier Propositions of Law had focused exclusively upon whether the Ninth District's decision was inconsistent with other "legal authorities" and "decisions rendered by this court and other courts of appeal throughout Ohio." Those were the issues which this Court agreed to accept in the jurisdictional ruling of February 4, 2009. Even if this Court is inclined to entertain the new Propositions of Law which have appeared for the first time in the Merit Brief of Appellants, they both plainly lack merit.

Proposition of Law No. 1: *Res ipsa loquitur* is an evidentiary principle premised upon the use of circumstantial evidence whereby negligence may be inferred in situations only where there is no affirmative proof of negligence; *res ipsa loquitur* is not applicable where there is direct evidence of specific acts that allegedly constitute the negligence at issue in the case.

A. NEW ARGUMENTS ON APPEAL

It is a fundamental tenet that new arguments may not be raised for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elec.* (1992), 65 Ohio St.3d 175, 177, 602 N.E.2d 622, 624; *Scott v. City of East Cleveland* (8th Dist. 1984), 16 Ohio App.3d 429, 431, 476 N.E.2d 710, 713-714. It has been cogently explained that:

The forum of a reviewing court is not a place where for the first time a point which has not been deemed of essence at the trial and which has not been seriously pressed to the attention of the court is to be brought to the front for the mere technical purpose of securing a reversal of a judgment which the court finds otherwise correct. 2 Ohio Jurisprudence Sec. 150, pages 298-299. [emphasis added].

Fawick Airflex Co., Inc. v. United Elec. Radio & Mach. Workers of Am., Local 735 (8th Dist. 1950), 56 Ohio Law Abs. 65, 90 N.E.2d 610, 616; *see also, Pitts v. Ohio Dept. of Transp. (1981)*, 67 Ohio St.2d 378, 423 N.E.2d 1105; *Meadows v. Owner/Liberty Constr., Inc.* (Aug. 11, 2005), 8th Dist. No. 85985, 2005-Ohio-4146, 2005 W.L. 1926044, p. *1; *Forman v. Sherman* (June 16, 2005), 8th Dist. No. 85165, 2005-Ohio-3022, 2005 W.L. 1413367, p. *2.

Here, Plaintiffs had previously argued that Defendants' novel "direct evidence negates *res ipsa*" argument had surfaced only at the outset of the Supreme Court proceedings. *Plaintiffs' Memorandum Opposing Jurisdiction of November 7, 2008*, pp. 1-2. The only justification which had ever been advanced in the proceedings below for refusing to supply the *res ipsa loquitur* instruction was the notion that such a charge is unwarranted whenever "multiple potential causative factors" exist and the expert testimony conflicts. *Id.* No suggestion was ever raised in either the trial court or appellate court to the effect that the purported presentation of "direct evidence" meant anything in this regard. This ill-conceived theory was devised only after the Ninth District had ruled in Plaintiffs' favor.

Tellingly, Defendants have not denied in their ensuing Merit Brief that this aspect of Plaintiff's Memorandum Opposing Jurisdiction is indeed correct. The undeniable verity that this entire Proposition of Law is being interjected for the first time in the Supreme Court has been conceded *sub silentio*.⁴ For this reason alone, this Court should reject the first Proposition of Law.

⁴ Defendants may be reserving a clever response which they intend to assert for the first time in a Reply Brief, thus denying Plaintiffs an opportunity for a written reply. It

B. THE CIRCUMSTANTIAL CASE

This Proposition of Law hinges upon Defendants' assurances to this Court that "it is undisputed that [Plaintiff] presented direct evidence of negligence." *Merit Brief of Appellants*, p. 8. Defendants are quite mistaken. Immediately after this spurious contention was first raised, Plaintiff argued at length that her entire case for negligence was purely circumstantial and dependent upon the availability of a *res ipsa loquitur* charge. *Memorandum Opposing Jurisdiction of Plaintiff-Appellee*, pp. 1-3 & 9-10. Even though the issue had not been briefed, even the Ninth District had remarked that:

Despite the lack of direct evidence of the guide wire being retracted or the dilator actually piercing the wall of the blood vessel, [Plaintiff's] experts unequivocally testified that the laceration to [the Decedent's] superior vena cava, more likely than not, resulted from Dr. Patterson's negligence during the procedure. [emphasis added].

Estate of Hall, 2008-Ohio-4332 ¶ 28.

Defendants appear to be operating under a deeply flawed understanding of the concept of "direct evidence." They seemingly believe that testimony becomes "direct" once the witness begins using forceful terminology such as "exactly" and "certainty." *Merit Brief of Appellants*, pp. 3-4 & 10-11. Apparently no judicial authorities from anywhere in the United States support this peculiar view, as none have been cited. *Id.*

The phrase "direct evidence" actually has nothing to do with how emphatically the witness testifies. Direct evidence has long referred to that which is supplied by eyewitnesses, or those who otherwise possess actual knowledge of the matter. *Rio Bar, Inc. v. State* (Franklin C.P. 1954), 69 Ohio Law Abs. 206, 117 N.E. 2d 522, 524-525; 42

is safe to assume that if a legitimate explanation did indeed exist for how this Proposition of Law was properly raised in the proceedings below, it would have been disclosed by now.

OHIO JURISPRUDENCE 3D, Evidence and Witness, Section 6. "Direct evidence is evidence that proves the existence of a fact without requiring any inferences." *Rowan v. Lockheed Martin Energy Syst.* (6th Cr. 2004), 360 F. 3d 544, 548 (citations omitted). On the other hand, "circumstantial evidence" refers to the "proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with a common experience of mankind." *Toledo v. Thompson-Bean* (6th Dist. 2007), 173 Ohio App. 3d 566, 879 N.E. 2d 799, 805 ¶ 30 (citations omitted).

Since no one who had actually observed the catheter implant procedure was willing to testify that anything had gone wrong, Plaintiff was forced to rely entirely upon circumstantial evidence and the opinions of independent experts in establishing liability. This was hardly fatal to her wrongful death claim. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pac. R. Co.* (1957), 352 U.S. 500, 508, 77 S. Ct. 443, 449, 1, L. Ed. 2d 493 fn. 17 (citations omitted). Ohio law no longer recognizes any distinction in probative value between these two types of proof. *Masonic Health Care, Inc. v. Finley* (2nd Dist. 2008), 176 Ohio App. 3d 529, 2008-Ohio-2891, 892 N.E. 2d 942, 947 ¶ 51; *H. Park Ptnrs. v. Frick*, 6th Dist. No. WD-08-054, 2009-Ohio-1462, 2009 W.L. 806750 ¶ 26.

The fact that Plaintiffs' experts testified that they had deduced "exactly" what had happened based upon their investigation and were "certain" about the validity of their conclusions hardly served to transform them into eyewitnesses capable of producing direct evidence. Rather obviously, evidence does not need to be "equivocal" and "uncertain" in order to qualify as circumstantial. Upon observing a layer of snowfall on

the ground at daybreak, one can be absolutely positive without any hesitation that a snowfall had occurred during the course of the evening even without actually observing it. The deduction is still being drawn from a logical inference based upon common experience and thus remains purely circumstantial. So it was with Plaintiffs' malpractice case against Defendants.

C. NECESSITY OF THE *RES IPSA* CHARGE

Recognizing that direct evidence of negligence was going to be unavailable to them, Plaintiff deliberately built her claim for malpractice upon Ohio's recognition of *res ipsa loquitur*. One purpose of this fundamental principle is to allow a plaintiff to avoid dismissal of the action as a matter of law when negligence cannot be precisely proven because the instrumentality at issue was in the exclusive possession of the defendant. See *Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St.3d 202, 205, 560 N.E.2d 165, 168-169. In appropriate cases, moreover, this concept allows claims to proceed to a jury when they otherwise would have failed due to lack of proof. See *Dearth v. Self* (4th Dist. 1966), 8 Ohio App.2d 33, 36, 220 N.E.2d 728, 730. In *Class v. Y.W.C.A.* (8th Dist. 1934), 47 Ohio App. 128, 16 Ohio Law Abs. 610, 191 N.E. 102, 103, the Cuyahoga County Court of Appeals explained that:

This rule of *res ipsa loquitur* is not a substantive rule of law, but rather a rule of evidence which permits the jury to draw an inference of negligence from the mere happening of an accident, where the instrumentality causing the injury is under the exclusive management and control of one of the parties and an accident occurs under circumstances where, in the ordinary course of events, it would not have occurred had ordinary care been observed. [citations omitted].

Plaintiff's Proposed Jury Instructions which had been filed on November 27, 2007 had sought the following charge:

One way a Plaintiff may prove negligence is through circumstantial evidence. Circumstantial evidence will be defined for you. You may, but are not required to, find that the Defendant was negligent if you decide by the greater weight of the evidence that:

1. The Ash Dialysis Catheter insertion procedure alleged to have resulted in injury to Lurene Hall was in the exclusive control of the Defendants at the time of the injury; and

2. The injury to Lurene Hall occurred under circumstances where in the ordinary course of events the injury would not have happened if the Defendants had exercised reasonable care.

Exclusive control by Defendants. The Ash Dialysis Catheter insertion procedure must have been in the exclusive control of the Defendants and not in the control, even partially, of any other persons.

Claims of Defendants. The Defendants claim that:

1. The Defendants was not in exclusive control of the Ash Dialysis Catheter insertion procedure.

2. The Defendants exercised reasonable care while in control of the Ash Dialysis Catheter insertion procedure.

3. The injury would have occurred whether or not the Defendants exercised reasonable care;

4. The injury was not caused by the Ash Dialysis Catheter insertion procedure.

Id., p. 15. This charge closely tracks that which has been furnished in 3 O.J.I. §331.03.

The parties were never in disagreement over the contours of *res ipsa loquitur*.

According to Defendants:

To warrant application of the rule, a plaintiff must adduce evidence in support of two conclusions (1) that the instrumentality causing the injury was under the exclusive management and control of the defendant; and (2) that the injury would not have occurred in the ordinary course of events absent negligence [emphasis added].

Brief of Defendant-Appellees served June 9, 2008, p. 16.

Defendants never disputed that the first requirement was satisfied the moment that the interventional radiologist admitted that he had been in exclusive management and control of the dilator and other instruments throughout the surgical procedure. *Tr. Vol. I, p. 153.* The only remaining issue therefore was whether Plaintiff had “adduce[d] evidence in support” of the second element. She plainly did so, since both of her experts forcefully testified that 4-cm. lacerations of the superior vena cava do not occur when the standard of care has been followed. *Tr. Vol. II, pp. 267-290, 289-290, 298-300 & 314; Vol. III, pp. 327-328, 335-336, 340 & 374.*

Little disagreement actually existed over whether mishandling the guidewire and dilator could seriously injure the patient. Even Dr. Patterson conceded that:

Q. So when the dilator is being inserted in the patient, you always insert it over a guidewire, correct?

A. Absolutely, yes.

Q. And the guidewire has to be in advance of the dilator or the dilator could cause damage to the vessel wall, correct?

A. Yes. ***

Q. And you would agree that it would be a violation of the standard of care to advance a dilator without the benefit of the guidewire being in front of it so it had something to track on, correct?

A. I definitely believe that would be a violation of the standard of care. [emphasis added].

Id., Vol. I, p. 117. Not surprisingly, his experts were in agreement with him in this regard. *Id., Vol. IV, pp. 452-453 & 511.* The following exchange took place during cross-examination of Dr. Leavitt:

Q. *** [I]f you have a guide – or a dilator that's being advanced without the benefit of sliding over guide wire, it could cause the type of injury that occurred in [the Decedent], four-centimeters laceration on the medial wall of the superior vena cava?

A. Absolutely.

Id., p. 456. Dr. Dean concurred.

Q. *** [Y]ou referred to this entire kit as being a very safe tool, correct?

A. It is a very safe tool.

Q. If used properly.

A. Yes.

Q. You would agree, though, that if it was – a dilator was advanced without the benefit of a guide wire that it is tracking over, that it could cause damage to the inside of a blood vessel?

A. It is possible.

Id., p. 511.

Since there was (1) no dispute that Dr. Patterson was in exclusive control of the dilator and other instruments which were being inserted into the Decedent during the surgery and (2) competent expert testimony that lacerations will not occur when the procedure is performed in accordance with the standard of care, then the *res ipsa loquitur* instruction was warranted. The very purpose of this venerable doctrine is to avoid the unfairness caused when the plaintiff is precluded from demonstrating precisely how the injury occurred because such could only be known by the defendant. *See Becker v. Lake Cty. Mem. Hosp. West (1990)*. 53 Ohio St.3d 202, 206-207, 560 N.E.2d 165, 169-170; *Shields v. King (1st Dist. 1973)*, 40 Ohio App.2d 77, 83, 317 N.E.2d

922, 927. Because the jurors were never informed that Ohio law permits such inferences to be drawn under these circumstances, Plaintiff was effectively precluded from properly establishing her entitlement to relief through valid circumstantial evidence.

D. THE CONSENSUS OF AUTHORITY

The Ninth District's concise decision is just one more in a long line of unbroken authorities recognizing that a *res ipsa loquitur* charge must be furnished when justified by the evidence presented at trial. The court in *Morgan v. Children's Hosp.* (1985), 18 Ohio St.3d 185, 480 N.E.2d 464, reversed a jury verdict in favor of a doctor defendant who administered anesthesia during surgery in a medical malpractice action. The trial court concluded that since expert testimony was required to establish the requisite standard of care, a *res ipsa loquitur* instruction was not appropriate. The *Morgan* court concluded that:

The reasoning of the lower court concerning *res ipsa loquitur* in medical malpractice cases is not compelling. Numerous other jurisdictions when faced with this same question have found that expert testimony can be used in medical malpractice cases to establish that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed, thereby allowing an instruction on *res ipsa loquitur* to be given to the jury. (footnote omitted).

Id., 18 Ohio St.3d at 189.

In *Getch v. Bel-Park Anesthesia, Assn.* (Apr. 15, 1998), 7th Dist. No. 96 C.A. 84, 1998 W.L. 201452, the court upheld application in the *res ipsa loquitur* doctrine in a medical malpractice case involving multiple defendants. The court opined:

It is well established that the doctrine of *res ipsa loquitur* is an evidentiary rule which allows a trier-of-fact to draw an

inference of negligence from facts presented, such that a trier-of-fact is permitted, but not compelled, to find negligence. *** *Res ipsa loquitur* is applicable in cases involving medical malpractice . *** To warrant such application, a plaintiff must produce evidence to show that the instrumentality causing injury was, at the time of said injury, under the exclusive control of the defendant and that the injury occurred under such circumstances which in the ordinary course of events would not have occurred if ordinary care had been observed. (citations omitted).

Id. at p. *2.

Similarly, in *Wiley v. Gibson* (1st Dist. 1990), 70 Ohio App.3d 463, 591 N.E.2d 382, a dental malpractice case, the plaintiff patient claimed that the defendant dentist negligently administered local anesthetic, resulting in permanent paralysis to her face. The trial court declined to provide the *res ipsa loquitur* instruction requested by plaintiff. The appellate court reversed. The *Wiley* court opined:

The evidence demonstrates that the instrumentality causing the injury to the plaintiff was the final injection of the local anesthetic and that the injection was solely under the control of the defendant. The trial court's finding that there existed variables which were outside the defendant's exclusive control, namely the plaintiff's physical frailties and natural reactions, is not supported by any evidence in the record before the court on the motion for summary judgment. In fact, the evidence would indicate otherwise since the plaintiff had received injections of local anesthetic from the defendant on previous occasions with no ill effect. Therefore, the first requirement for the application of *res ipsa loquitur*, that the instrumentality be under the defendant's exclusive control, is met.

With respect to the remaining aspect of the doctrine, the plaintiff offered the deposition of an expert who explained the proper procedure for administering an injection of anesthetic along the mandible. The expert further testified that the only way to create permanent damage to the trigeminal nerve, resulting in paresthesia of the face and tongue, is by improper technique in the injection of the nerve with a needle. . . . It is true that the expert did not explicitly

state that he believed the defendant was negligent in his administration of the anesthetic to the plaintiff. Nevertheless, his testimony is sufficient to establish that paresthesia of the face and tongue does not ordinarily occur if an injection of an anesthetic along the mandible is properly administered with ordinary care. The plaintiff has, therefore, met both prerequisites for the application of the doctrine of *res ipsa loquitur* to these facts.

Id., 70 Ohio App. 3d at 465-466. In light of these authorities, the Ninth District's unerring analysis should be affirmed and this Proposition of Law should be rejected.

Proposition of Law No. II: *Res ipsa loquitur* is not applicable where there is evidence adduced at trial either by the plaintiff or defendant of two equally efficient causes of injury, one of which is not attributable to the negligence of the defendant.

A. THE ALTERNATIVE CAUSES THEORY

This second Proposition of Law is founded upon the theory that a jury charge is warranted only when the jurors have no choice but to accept that it applies to the case. However, Civ. R. 51(A) has long permitted litigants to request any instruction that accurately states the applicable law, or can be appropriately modified to apply in the particular context. *R.H. Macy & Co., Inc. v. Otis Elevator Co.* (1990), 51 Ohio St.3d 108, 112, 554 N.E.2d 1313, 1317. This Court has observed that:

Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. Markus & Parmer, Trial Handbook for Ohio Lawyers (3 Ed. 1991), 860, Section 36:2.

Murphy v. Carrollton Mfg. Co. (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, 832; see also *American States Ins. Co. v. Caputo* (8th Dist. 1998), 126 Ohio App.3d 401, 406, 710 N.E.2d 731, 734. There is no requirement in Civ. R. 51(A) that the evidence must be

undisputed before the trial court can furnish a charge which is justified by the requesting party's case-in-chief.

Defendants further contend that so long as "there is evidence adduced at trial by either the plaintiff or defendant of two equally efficient and probable causes of injury, one of which is not attributable to the negligence of the defendant, the rule of *res ipsa loquitur* does not apply." *Merit Brief of Appellants*, p. 13. It is unclear who is supposed to determine what is "equally efficient and probable" and, perhaps more significantly, how such an inherently amorphous standard can ever be resolved objectively. Presumably, the interjection of even the most far-fetched alternative causation defense – such as Dr. Dean's "flesh eating bacteria" theory – would prevent a jury from ever learning that *res ipsa* is a fundamental tenant of Ohio jurisprudence. Where, as here, the evidence of negligence is purely circumstantial, the unavailability of an such a charge can be fatal to the claim. A defendant would have to openly concede that there was only one "efficient and probable cause of injury" before *res ipsa* would be available.

Defendants' reasoning ignores the fact that it was solely the jurors' prerogative to assess the credibility of the witnesses. See generally *Bowen v. Kil-Kare, Inc.*, (1992), 63 Ohio St. 3d 84, 88, 585 N.E. 2d 384, 389; *Turner v. Turner*, 67 Ohio St. 3d 337, 340-342, 1993-Ohio-176, 617 N.E. 2d 1123. If they believed Plaintiff's experts and concluded that (1) Defendants were in exclusive control of the instrumentalities which caused the laceration and (2) such fatal complications do not occur in the ordinary course of events absent negligence, they would still be unable to render a verdict for her unless they understood that *res ipsa loquitur* is recognized in Ohio. As a result of the trial judge's rash ruling below, the jurors never appreciated that they were entitled to

draw such an inference. Furnishing them with a correct statement of all the applicable legal standards was thus essential, even though the defense had presented testimony which – if believed – would not permit a *res ipsa* inference.

According to Defendant’s twisted logic, the parties’ experts would also have to be in complete agreement with each other on causation before *res ipsa* could be invoked. *Merit Brief of Appellants*, pp. 12-14. The notion that the “defendant wins” and the charge is prohibited whenever such a dispute exists threatens to override the fundamental guarantee of a right to trial by jury. As the Ninth District properly recognized, the trier of fact in this instance could justifiably conclude from the testimony of Plaintiff’s experts that all the requirements for a *res ipsa* inference have been met despite the defense claims of “either a pre-existing flesh-eating bacteria or an unknown abnormality in the blood vessel.” *Estate of Hall*, 2008-Ohio-4332 ¶ 29-30. Defendants certainly would have been entitled to argue that their theories of causation precluded a *res ipsa* inference, and the issue ultimately would have been one for the jury to resolve. Prohibiting them from being informed about a well-established principle of Ohio jurisprudence simply because the evidence was “conflicting” is simply illogical.

B. DEFENDANTS’ INAPPOSITE AUTHORITIES

Defendants’ authorities are wholly distinguishable. They have continued to rely upon *Jennings Buick*, 63 Ohio St. 2d 167, 406 N.E. 2d 1385, but have made no attempt to specifically address the Ninth District’s lengthy analysis of that decision. *Merit Brief of Appellants*, p. 13. That was not a medical malpractice action, as property damages were being sought as a result of a burst water main. The application of *res ipsa* was thus quite a stretch. A further, and more significant, problem for the plaintiff was that its

own expert had conceded that there were a number of potential explanations for the break which could not be blamed upon the municipality. *Id.*, 63 Ohio St. 2d at 174. As the Ninth District reasoned below, the instant Plaintiff had established a far more compelling and unequivocal case for *res ipsa loquitur* than the car dealership in *Jennings*. *Estate of Hall*, 2008-Ohio-4332 ¶ 27-30. Without the benefit of the inference, they could not hope to succeed upon their purely circumstantial case.

In *Roberts v. Crow* (Dec. 21, 2005), 9th Dist. No. 22535, 2005-Ohio-6744, 2005 W.L. 3481490, the patient plaintiff's expert recanted his testimony during trial. The defendant moved for a directed verdict, which the court granted. As a result of the plaintiff expert recanting his testimony, the court concluded that the plaintiff failed to establish the elements of a prima facie medical malpractice claim. The appellate court concluded that the plaintiff's expert had not recanted his testimony, and thus, the plaintiff established his prima facie case. With respect to the argument that the trial court erred in concluding that the *res ipsa loquitur* doctrine did not apply, the appellate court held that there was evidence that something other than negligence caused the injury.

Similarly, in *Brokaw v. Mercy Hosp. Anderson* (1st Dist. 1999), 132 Ohio App.3d 850, 726 N.E.2d 594, competing experts offered differing testimony concerning whether injection actually caused patient's nerve damage. In *Hager v. Fairview Gen. Hosp.* (July 29, 2004), 8th Dist. No. 83266, 2004-Ohio-3959, 2004 W.L. 1688537, the expert's testimony regarding the cause of decedent's injuries was merely speculative and insufficient to establish that defendant "probably, rather than merely possibly" caused decedent's injuries. Finally, in *Bowden v. Annenberg* (Dec. 9, 2005), 1st Dist. No. C-

040499, 2005-Ohio-6515, 2005 W.L. 3338935, there was evidence that the injury could have occurred in the absence of negligence. As the *Bowden* court recognized, “applicability of *res ipsa loquitur* must be determined by the trial court on a case-by-case basis.” *Id.* at p. *6. Because the relatively unique facts of the instant action did indeed justify a *res ipsa* charge, this Proposition of Law should also be rejected.

C. PROCEDURE IN THE EVENT OF REMAND

The undersigned counsel would be remiss if they did not briefly mention the Assignment of Error which was never resolved by the appellate court. Plaintiff had argued at length that she had been unjustifiably prohibited from presenting critical rebuttal testimony as an alternative ground for reversing the defense verdict. *Brief of Plaintiff Appellant, 9th Dist. Case No. 24066, pp. 10-19.* As permitted by App. R. 12(A)(1)(c), the Ninth District never reached that issue once a new trial was ordered on the basis of the deficient jury charge. *Estate of Hall, 2008-Ohio-4332 ¶ 32.* Accordingly, if there is to be a reversal then a remand will be necessary to that appellate court to resolved the remaining Assignment of Error. *Allstate Ins. Co. v. Cleveland Elec. Illum, 119 Ohio St. 3d 301, 305, 2008-Ohio-3917, 893 N.E. 2d 824, 828 ¶ 16; State v. Crotts, 104 Ohio St. 3d 432, 437, 2004-Ohio-6550, 820 N.E. 2d 302, 309 ¶ 28.*

CONCLUSION

For the foregoing reasons, this Court should reject the two Propositions of Law which have been devised by Defendants and affirm the Ninth Judicial District in all respects. In the event that one of the Propositions of Law is found to have merit, then this action should be remanded to the appellate court for consideration of Plaintiffs' First Assignment of Error addressing the improper preclusion of rebuttal testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Merit Brief** was served via regular U.S. Mail on this 26th day of May, 2009 upon:

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